In The

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1975

No. 75-1233

REA EXPRESS, INC., a Bankrupt,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

AIRLINES PARTICIPATING in AIR EXPRESS SERVICE, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN RETAIL FEDERATION, BROTHERHOOD of RAILWAY and AIRLINE CLERKS, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, DRUG and TOILET PREPARATION TRAFFIC CONFERENCE, and EASTERN INDUSTRIAL TRAFFIC LEAGUE, PET INDUSTRY PARTIES, EMERY AIR FREIGHT,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REA Express, Inc., a Bankrupt,

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Airlines Participating in Air Express Service, Air Freight Forwarders Association, American Retail Federation, Brotherhood of Railway and Airline Clerks, National Small Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference, and Eastern Industrial Traffic League, Pet Industry Parties, Emery Air Freight,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, REA Express, Inc., a bankrupt ("REA"), respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered on October 6, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 524 F.2d 54, and the related opinions of the Civil Aeronautics Board ("CAB"), appear in the appendix hereto. Page references to the appendix are cited with the suffix "a."

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 6, 1975. A timely petition for rehearing was denied on December 1, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). See *Morse v. United States*, 270 U.S. 151 (1926); *United States v. Healy*, 376 U.S. 75, 78 (1964).

QUESTIONS PRESENTED

1. Whether the decision to terminate Air Express could be made without a comparative hearing as to (a) the costs to be borne by the shipping public for alternative services, or (b) a new service proposed by the Civil Aeronautics Board but not yet developed.

2. Whether an environmental impact statement or evaluation was required.

3. Whether a public transportation service may be terminated without a supplemental hearing with respect to substantial changes in circumstances including the carrier's efforts to reorganize as a "debtor-in-possession" pursuant to Chapter XI of the Bankruptcy Act.

STATUTORY PROVISIONS INVOLVED

Section 102 of the Federal Aviation Act, 49 U.S.C. §1302:

In the exercise and performance of its powers and duties under this chapter, the Civil Aeronautics Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such a manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, *and foster sound economic conditions in,* such transportation, and to improve the relations between and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers *at reasonable charges,* without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics. [Emphasis added.]

Section 1002(e) of the Federal Aviation Act, 49 U.S.C. §1482(e):

In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors —

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers *at the lowest cost consistent with the furnishing of such service;*

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service. [Emphasis added.]

Section 1002(h) provides (49 U.S.C. §1482):

(h) Whenever, *after notice and hearing,* upon complaint or upon its own initiative, the Board is of the opinion that the divisions of joint rates, fares, or charges for air transportation are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the air carriers or foreign air carriers parties thereto, *the Board shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers. The Board may require the adjustment of divisions between such air carriers from the date of filing the complaint* or entry of order of investigation, or such other date subsequent thereto as the Board finds to be just, reasonable, and equitable. [Emphasis added.]

STATEMENT OF THE CASE

The transportation service known as "Air Express" was originated by REA's corporate predecessor in 1927, prior to the passage of the Civil Aeronautics Act of 1938. From 1927 until 1944, Air Express was the *only* service under which small shipments were hauled throughout the United States by common carriers by air. The air services were performed by the airlines and REA provided the ground services, including handling, transfers, routing, billing, and pickup and delivery, pursuant to a comprehensive agreement. REA was regarded as

an "indirect" air carrier. Beginning in 1944, however, the airlines began to publish their own tariffs and promote their own air freight businesses. Air freight forwarders developed thereafter.

Despite the competition by the new services, Air Express retained certain distinctive characteristics. It was the only "priority" service: the shipments were boarded first after baggage and mail, and generally on the first flight out of an airport, regardless of airline. It covered all points in the United States, knitting the various airlines together into an integrated service. It specialized in shipments that were small and difficult to handle. It utilized a single, simplified tariff for all shipments on all airlines, and to all locations. It provided unusual services, such as armed guard protection. And, for those small shipments it was best equipped to handle, it charged less than competing services.

Since 1929, REA had been owned by the railroads. In 1969, however, the railroads sold REA in an undercapitalized condition to a group put together by a new management which the railroads' voting trustees had recruited.

The Air Express arrangement had previously been dependent upon agreements negotiated between REA and a committee representing all of the airlines, subject to the approval of the CAB. The agreements had a five year term. When REA's new management came into the picture in 1969, the Air Express agreement was about to expire. The new management discovered that, with the relative growth of the airlines' separate air freight businesses, it had become increasingly difficult to negotiate a satisfactory Air Express agreement with the airlines as a whole. The new management further discovered that the

airlines, to encourage the growth of their separate businesses, were pricing air freight at substantially below cost.[1] The airlines received about twice as much per ton mile from their share of the Air Express divisions as they received from air freight. Although the airlines did not receive their fully allocated costs from either service, studies showed that they received a higher percentage of fully allocated costs from Air Express than they did from air freight. Finally, it appeared to REA's new management that the capital which the company so badly needed to remain in business would not be forthcoming as long as its ability to remain in Air Express was dependent upon the good will of the airlines, who after all were competitors, in negotiating an agreement.

Accordingly, on April 9, 1970, REA filed a petition and complaint with the CAB, asking that the following be established as the major principles to govern the Air Express arrangement:

> 1. The amount which REA pays the airlines should be fairly related to what other airline customers pay for air transportation.
>
> 2. REA should have the independent right, subject to Board approval, to develop and revise tariffs for Air Express service free from the

1. The substance to this contention is indicated by the subsequent finding of an Administrative Law Judge in a separate proceeding, the Domestic Air Freight Rate Investigation, Docket 22859. In that case, which is still pending, the Administrative Law Judge found that, based on 1972 data, air freight rates are unreasonably low and unjustly discriminatory, and that they should be increased on an average by 38.8%.

power of veto which the air carriers now have. The Air Express agreement and the tariff developed thereunder should not, as has been the case in the past, preclude Air Express customers from using the service for the long-haul air market and for a broader range of shipments.

3. The agreement should be permanent and provide for arbitration in the event that negotiations are unable to resolve disputes.

However, the CAB dismissed REA's petition and complaint, and bifurcated the issues raised therein into two separate proceedings: the Air Express Rates case and the Air Express Service case. REA promptly, but to no avail, objected to the severing of issues which were inextricably intertwined into two separate proceedings. The cases were assigned to different Administrative Law Judges who conducted separate hearings on separate timetables. And while the Board reached a final decision in the Air Express Service case, the Air Express Rates case, from which REA hoped to obtain the economic wherewithal for its survival, through the CAB's power (and statutory duty) to make retroactive determinations with respect to rate "divisions,"[2] remains undecided, consigned to some kind of administrative limbo called informal conferences. Meanwhile REA, unable to weather the CAB's terminal edict for Air Express, has been adjudicated a bankrupt. Thousands of employees have been thrown out of work, the interests of stockholders and thousands of creditors with millions of dollars in claims wiped out, and shippers throughout the country deprived of express services.

2. REA's expert witness calculated that the amount of overpayment to the airlines, based upon the yields which they were receiving from air freight, would have been in the approximate amount of one million dollars per month, retroactive to April 9, 1970.

Following oral argument in the court below, in an attempted settlement, REA and the airlines negotiated a new Air Express agreement which they felt addressed in a constructive way the Board's reservations about the prior arrangement. The court remanded the matter so that the CAB could consider the new agreement. Without further hearing or argument, however, the Board adhered to its former conclusion, ignoring REA's financial plight in the groundless belief that REA's operation as a freight forwarder would provide the best opportunity for its survival. By that time, REA had been compelled to petition for reorganization under Chapter XI of the Bankruptcy Act, and the Board never stopped to inquire whether REA then had the ways and means of transforming its Air Express business into air freight forwarding. REA requested a hearing but in vain.

The CAB's conclusion about the supposed desirability of REA's becoming a freight forwarder was thrown into stark irrationality by the Board's decision, in yet another docket, to require the airlines to develop another priority, interline service for small shipments. REA contended that Air Express should be kept in existence at least until the new service was developed so that comparative benefits and costs could be measured, to which the CAB responded with the contention that what it envisioned was not a replacement for Air Express. Whether the new service planned was or was not a replacement for Air Express — a contention difficult if not impossible to refute because of the impossibility of knowing precisely what the Board had in mind — was irrelevant, of course, to the question of why Air Express could not at least be retained in existence until the shippers — those who would actually use the service — could give voice to their preferences.

The CAB's death knell decision for Air Express had a predictable effect on REA's business; Air Express traffic dropped off markedly, a condition exacerbated by the decision of affirmance below on October 6, 1975, and on November 6, 1975, REA was adjudicated a total bankrupt.

Meanwhile, the Trustee, C. Orvis Sowerwine, Esq., has maintained certain of REA's profitable activities in operation, and seeks means whereby the company can be rehabilitated and restored to viability through a sale or other infusion of capital, in the hope that the value of REA's rights, of which he regards Air Express as an important part, can be preserved and realized upon as assets of the bankrupt estate. Funds potentially may be available through the Railroad Revitalization and Regulatory Reform Act of 1976, which has just been enacted. That Act defines "railroad" to include "a common carrier by railroad or express as defined in section 1(3) of the Interstate Commerce Act," a definition which REA, as the historical express company, would satisfy. *Congressional Record,* January 23, 1976, p. H218.

The Trustee regards the decision below as a substantial impediment to his hopes for rehabilitation and restoration. Accordingly, the Trustee has sought and obtained permission from Bankruptcy Judge John J. Galgay, in S.D.N.Y., Dkt. No. 75 B 251, to cause this petition for certiorari to be filed.

The Court of Appeals has granted a stay to prevent implementation of the CAB's decision, denied the CAB's request to dissolve the stay (3a), and has stayed the mandate pending determination and final disposition of a petition for certiorari (5a), on the basis of REA's showing of irreparable injury.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with statutory requirements and with decisions of other courts in failing to require findings as to the economic impact involved in the termination of a public service.

The Federal Aviation Act requires the CAB to consider "the need in the public interest of adequate and efficient transportation of . . . property by air carriers *at the lowest cost* consistent with the furnishing of such service." (49 U.S.C. §1482(e)(1) and (2).) (Emphasis added.)

Such a crucial consideration may not be ignored by the CAB in making a determination to terminate Air Express. As stated by this Court in *Atchison Topeka & Santa Fe Railway Co. v. Wichita Board of Trade,* 412 U.S. 800, 817 (1973): "Even giving the Commission's opinion the most sympathetic reading that we find possible, we cannot discover in it an expressed reason for permitting the railroads to reduce their services without showing that the rates they propose to maintain are reasonable rates for the service they intend to provide."

By bifurcating the issues raised by REA's petition and complaint filed in 1970, putting the issues in the Service case ahead of the economic issues raised in the Rates case procedurally, the Board deprived REA and the shipping public of important statutory rights to their substantial prejudice.

The decision below is at variance with the decisions of other circuits indicating that public interest determinations regarding

air services *must include* determination of the economic consequences. See *Alaska Airlines v. CAB*, 285 F.2d 672, 674 (D.C. Cir. 1960); *Nebraska Department of Aeronautics v. CAB*, 298 F.2d 286, 291 (8th Cir. 1962). By terminating a public service without first making an economic determination of the costs of the service, the CAB effectively eliminated any possibility of meaningful public participation in what it might have to pay for competitive services, a result out of harmony with the decision of the D.C. Circuit in *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). How could the shipping public make a choice as to which service it would prefer without knowing ultimately what the cost would be? Nor does the decision below offer a supportable response to that issue by referring to the level of rates reflected in the then current tariff (19a). As *Moss, supra*, shows, reference to tariff levels is not an adequate means of discharging the CAB's statutory economic requirements.

In the Rates case, REA contended that the amounts received by the airlines for their Air Express divisions were excessive by approximately one million dollars per month, compared with their yield from air freight. Had those divisions been adjusted as requested, REA would have been strengthened financially and the shipping public would have been the ultimate beneficiaries of reduced costs. The "hidden cost" of regulation, when the regulatory agencies, as here, fail to take such considerations into account, has been the subject of much recent discussion.

The kind of error which results from the absence of adequate analysis is exemplified by the general comment of the court below with respect to recent tariffs (19a-20a). Ignored is

the fact that the rates for *priority* service by individual airlines have been 130% of their general commodity rates for air freight, which do not include pickup and delivery. The comment also does not take into account the fact that in the still-pending Domestic Air Freight Rate Investigation, Docket 22859, the CAB's Administrative Law Judge found that air freight rates "are unjust and unreasonable" and that the prevailing freight rate structure is "unjustly discriminatory," leading to the conclusion that air freight rates should be increased by an average of 38.8%. Thus there has been a substantial escalation in what shippers have to pay for priority service for traffic formerly moving by Air Express, and further escalation apparently is in store.

The comparative cost analysis required is a responsibility imposed upon the administrative agency, see *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 92 (1957), and in this case, Air Express was terminated before that analysis ever reached the point of administrative finality, notwithstanding a finding by the Administrative Law Judge that "air freight forwarder service is not endowed with the favorable economics of a single ground agency concept, and consequently it cannot develop a rate structure for small shipments commensurate with air express." (JA624(a).)

If Congress has mandated that a factor be given consideration in the hearing process, it would make a mockery of the will of Congress, and due process as well, to permit the requirement to be side-stepped, as does the decision below, by stating that there is no "assurance" that the hearing would yield findings which would require a change in the Board's

decision (21a). Either the hearing process as such has integrity or it does not, and the condition that "assurance" be shown before even a hearing will be allowed implies a kind of *a priori* reasoning which (a) is the antithesis of due process, and (b) would effectively preclude judicial review. As stated in 2 Davis, *Administrative Law*, §15.14, p. 432:

> "The cardinal principle of fair hearing is . . . that parties should have the opportunity to meet in appropriate fashion all facts that influence the disposition of the case. . . . Nothing short of bringing the facts into the record, so that an unabridged opportunity is allowed for cross-examination and for presentation of rebuttal evidence, will suffice for the disputed adjudicative facts at the center of the controversy."

The requirement imposed by Congress that no significant administrative action can be taken in certain areas without findings on the *environmental* impact can not be obviated in service abandonment cases by a ritualistic recitation that there is no "assurance" that such findings would produce a different result, and we submit that Congress has spoken no less plainly in requiring findings on the *economic* impact in cases such as the one here involved.

Besides the overriding requirement that the CAB anchor its action on the considerations specified by Congress, the Administrative Procedure Act mandates findings on *each* of the statutory considerations to be supported by substantial evidence on the record, 5 U.S.C. §706(2)(E), and the courts in other

circuits have not hesitated to reverse CAB action when the Board has failed to state separate findings on all material issues presented. See *Trailways of New England, Inc. v. CAB*, 412 F.2d 926, 936 (1st Cir. 1969); *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 462 (D.C. Cir. 1967); *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579, 588 (1st Cir. 1964); *Carey v. CAB*, 275 F.2d 518, 524 (1st Cir. 1953); *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

REA also consistently has requested that it be afforded an *Ashbacker*-type comparative hearing with regard to the new priority interline service which the CAB has ordered the airlines to develop. Only this Court can resolve the important issue of whether such a hearing is required in the circumstances of this case by *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945), and we respectfully request that it do so. In rejecting the applicability of *Ashbacker* to this case, the court below apparently has applied a different standard than the District of Columbia Circuit in *Kodiak Airways, Inc. v. CAB*, 447 F.2d 341 (D.C. Cir. 1971).

II. The CAB's failure to address itself to the requirements of the National Environmental Policy Act in the context of a decision to terminate Air Express gives rise to a public policy issue of sufficient importance to warrant review by this Court.

The CAB, regulating an industry with the greatest environmental impact per ton-mile of freight moved,[3] should be

3. Commoner, "Reporter at Large: Energy — III," *The New Yorker*, Feb. 16, 1976, p. 64, states:

(Cont'd)

required to explain to this Court why, six years after passage of the National Environmental Policy Act, it seeks the destruction of the service with the least adverse environmental impact without attempting to address itself to the statutory environmental requirements (42 U.S.C. §4332).

The fact that the administrative agencies have been laggards in satisfying the requirements of the National Environmental Policy Act has already provoked judicial comment with respect to the Interstate Commerce Commission. *Harlem Valley Transportation Association v. Stafford,* 500 F.2d 328, 331 (2d Cir. 1974).

The *Harlem Valley* case involved local rail abandonment proceedings; the termination of nationwide Air Express service has a much greater environmental effect and presents an *a fortiori* situation. The adverse consequences are no longer a matter of speculation. Following the cessation of Air Express services as a result of REA's adjudication in bankruptcy, Federal Express, an air taxi cargo carrier seeking exemption authority to

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> "Transportation dominates the energy picture. It is the largest single end use of energy, consuming twenty-five per cent of the total American energy budget."
> "Air pollution from transportation can be judged by the amount of fuel burned. . . ." (p. 69).
> "In the last few years, energy productivities have been computed for all the major modes of intercity transportation. Railroads . . . have the highest energy productivity for general freight: 1,300 ton-miles per million B.T.U.s, compared with 360 for intercity trucks and 20 for airlines." (p. 68).

use larger aircraft, filed a petition for reconsideration with the CAB dated January 28, 1976 making the following statement:

> "The gap created by the final collapse of REA's long-declining Air Express service has had a particularly significant impact on Federal Express' traffic because so few other air freight carriers offer a system having a geographic scope comparable to that of REA, particularly at low density cities." (pp. 11-12).

The bottom line in environmental terms is the admission that, because of the large amount added to its nightly volume by the cessation of Air Express, Federal has had "to add needed capacity on a grossly inefficient basis — greatly increasing its cost, wasting scarce fuel, and jeopardizing its service reliability." (p. 3).

Nor does the simplistic solution proposed by Federal — letting it use larger aircraft — address itself to the underlying problem.

Air Express is the least costly and most efficient method of moving small shipments by air because of the shared use of equipment and facilities. For the same reason, the environmental consequences are less. As the Administrative Law Judge found, 80% of Air Express shipments were carried in the cargo space of combination aircraft, space which in recent years, with the advent of wide bodied aircraft, has been greatly underutilized (JA626(a)). As these aircraft carry passengers also, they would be operating in any event, and the environmental impact of Air

Express carried in that way therefore was minimal. In contrast, only 42% of air freight forwarder traffic moves on combination aircraft; the rest moves on specialized all-cargo aircraft, a condition of imbalance which the ALJ found would be exacerbated by the shift of Air Express to forwarder operations. Noise is a further environmental factor because of the emphasis placed by forwarders on all-cargo night operations, and the potential effect on day/night operational patterns.

The lack of an environmental impact statement was raised in but ignored by the court below (REA Br. 45, fn.). The point was not raised directly in the administrative hearing because of the following factors: (a) REA was not seeking termination of Air Express but its continuation, (b) testimony regarding the greater efficiency of Air Express was introduced, (c) the proponents of the termination of Air Express, if anyone, had the primary responsibility for justifying the environmental consequences of the change which they sought, (d) the *Harlem Valley* and other cases make it clear that the burden of assuring compliance with the National Environmental Policy Act falls upon the agency itself, (e) at the time of the hearing, the CAB's definitive environmental regulations [promulgated in September 1975] were still several years from being written, and (f) the Administrative Law Judge held that Air Express should be *continued*, in part because of its greater efficiency of operation, so at the time of review by the CAB, REA had no basis for objecting to the lack of an environmental assessment nor was it aware of the substantial nature of point until later, when the great expansion in operations by Federal Express took place.

When Federal Express applied for an exemption to allow it to operate larger aircraft, REA opposed the application and moved to have the application consolidated with the Air Express Service case and the CAB's priority service docket so that a comparative hearing could be held on environmental and other aspects. We also pointed out that Federal's operation was inherently wasteful, whether it used large or small aircraft, because of its specialized nature and the circuity involved, causing unnecessary air and noise pollution, and that

> "The increase in the use of special purpose aircraft, while the regulated air carriers are operating combination aircraft with only a fraction of their belly capacity filled with cargo would constitute a major federal action having a substantial impact upon the environment." *Request for Hearing and Motion*, Oct. 14, 1975, p. 9.

The CAB ignored the environmental aspect and dismissed REA's motion as moot on the ground that it had denied the application for other reasons. *CAB Order 75-12-38*, Dec. 8, 1975. However, the environmental point was *not* moot; it was intensified as a result of the cessation of Air Express and continued operations by Federal, as demonstrated by the statements quoted above from Federal's petition for reconsideration.

The CAB may contend that REA could raise the same issue in the District Court by bringing an unusual action in the nature of mandamus, as in *Harlem Valley, supra*. But neither REA nor

the judicial system has the time nor resources to afford that kind of redundancy. The CAB's undeniable neglect in addressing air cargo environmental concerns generally and in the context of this proceeding particularly, we submit is a subject well worthy of this Court's attention. Cf. *Stern & Gressman, Supreme Court Practice* §11.1 (4th ed. 1969).

III. The decision below raises significant and recurring problems concerning the relationship between the exercise of jurisdiction by one administrative agency in such a way as to preclude or frustrate the jurisdiction of other administrative agencies, or the Bankruptcy Court.

Air Express accounted for approximately 30% of REA's total revenues. The rest was derived from surface express, operated under certificates of public convenience and necessity issued by the Interstate Commerce Commission and various state agencies. By placing the continuation of REA's unique surface express operations in extreme jeopardy, the CAB has brought havoc to a sector of the public interest with respect to which it has no jurisdiction.

For over one hundred years, express operations have been characterized by their inter-modal nature. This was so significant a factor in REA's situation that a tripartite group with representatives of the CAB, the Federal Maritime Commission and the Interstate Commerce Commission worked together to produce a comprehensive *Study of REA Express (Staff Study)* in 1965. This Study pointed out that regulation of REA by the different agencies "... is by virtue of various statutory provisions which leave unanswered some questions of lines of demarcation among the several agencies, and also of coverage of

all REA activities," and that "the impact of competition goes beyond the areas in which a single agency may exercise its authority." (p. 3).

In its annual report for fiscal year 1974 the ICC expressed concern about the effect of the CAB's ruling regarding Air Express (p. 54): "A December [1973] ruling by the Civil Aeronautics Board affecting the operational status of REA Express, Inc. (REA) may have serious bearing on the company's capability to maintain a financially viable posture." It adds (p. 55): "Whether REA has the capability to continue as a viable transporation entity in light of the CAB order remains to be seen." In addition, the ICC's annual report states *(ibid.)*:

> "In light of these circumstances and the special status which REA enjoys under the Interstate Commerce Act in the conduct of its express service, a joint hearing of the Senate Subcommittees on Air and Surface Transportation was held in executive session on June 10, 1974, to investigate the situation involving REA. The Commission presented testimony at these hearings concerning the current operations of REA. The conclusions of the hearing have not as yet been made public."

And the Senate Committee on Commerce in its Report entitled "Federal Assistance For Carriers of Express" (S. Rep. No. 92-1158, September 15, 1972) stated (p. 3):

"REA has long provided service for such unique and sometimes undesirable and troublesome items as corpses, blood, valuables, live animals, ornamental crops, fresh fruits and vegetables, shoes, drugs, medicines, coffee, typewriters, furniture, flagpoles and the occasional household items, steamer truck or camp baggage. Generally speaking, REA is a carrier of small shipments. Reportedly half its shipments weigh less than 50 pounds, almost three of every four are under 100 pounds and only 1/20 of REA's traffic is shipments weighing 1,000 pounds or more. Currently the company employs some 16,000 employees."

* * *

"The Committee is concerned about the possible loss of REA Express service which the Committee deems to be important even though other companies in some instances may provide similar service. The need for small shipments service is of such that the loss of a significant competitor for small shipments traffic could conceivably reduce substantially the quality of service for small parcels. Indicative of potential difficulties are the problems which reportedly face the pet industry, many breeders and dealers (of dogs and birds especially). Some are considering institution of proprietary service, and others the formation of a shipper's association.

Many others, however, are too small to engage in such operations. Their potential problems are most serious."

As noted in the Statement of the Case, *supra*, Congress has just enacted the Railroad Revitalization and Regulatory Reform Act of 1976, containing provisions for financial assistance for express companies like REA. The trustee is very desirous of finding a successor who will rehabilitate the Express Company. Thus the CAB's decision to terminate Air Express places a serious obstacle in the path of rehabilitation, and raises important public policy considerations which do not lie within the jurisdiction of the CAB exclusively.

Approximately two-thirds of REA's revenues derive from surface express operations regulated by the Interstate Commerce Commission and the regulatory agencies of the various states throughout the United States. To permit an agency which has an impact upon substantially less than half of the total of the operation conducted in the public interest to have a veto power over the possibility of rehabilitating the Express Company would be to undercut the regulatory authorities and responsibilities of the other agencies affected in a way which Congress could not have intended.

The court below said it saw no "need" for the CAB to postpone its decision until it has finally determined the issues in the Rates case or put into effect a new high-priority service (20a-21a). We suggest that the burden should be just the opposite: in view of the important public policy considerations pointed out above, what was the Board's "need" to implement its decision

before those additional events take place? A good and faithful servant of almost fifty years standing is entitled to no less consideration.

Further, there is a substantial question whether REA was accorded procedural and substantive due process by the CAB as it struggled for survival. On February 18, 1975, REA was forced to seek reorganization under Chapter XI of the Bankruptcy Act. This presented an opportunity to submit new operational plans which would reduce costs and give the company an opportunity to straighten out its financial affairs. The creditors were cooperative. However, the existing labor agreements constituted a serious impediment to success, and REA succeeded in an action to have them rejected as onerous and burdensome by the Bankruptcy Court. In *Brotherhood v. REA Express, Inc.*, 523 F.2d 164, 170 (2d Cir. Aug. 27, 1975), *cert. denied*, —— U.S. ——, the court said:

> "When REA, after going into Chapter XI proceedings, was authorized to operate as a debtor-in-possession, it acted as a new juridical entity."

It was treated as a "new employer" which, the court emphasized, "...must be granted certain prerogatives at the outset in making changes in the method of operation, business structure and labor arrangements of a venture. Otherwise, the free flow of capital and efforts to revive or expand a weak enterprise might be frustrated." (*Ibid.*)

No single factor led to a greater degree of frustration of the efforts to revive or expand REA as a Chapter XI debtor-in-possession than the CAB's inflexibility. When so extreme an action as the rejection of collective bargaining agreements as onerous and burdensome may be justified to satisfy the objectives of the Bankruptcy Act, do not those same objectives require the CAB at least to *consider* the possibility of some accommodation? The Federal Aviation Act itself specifies that the CAB *shall* consider "The regulation of air transportation in such a manner as to . . . foster sound economic conditions in, such transportation . . . ." (49 U.S.C. §1302(b).)

Despite the extremity of REA's situation, and its status as a new "juridical entity," the CAB was unwilling even to accede to its request for a hearing following the filing of its petition for reorganization under Chapter XI. In its request for such a hearing, REA stated that, "Fairness alone would dictate that, if the Board is unwilling to approve the new Air Express agreement in its present form, it should indicate what terms and conditions it would approve so the continuity of employment could be assured." Hence, REA's request was that the CAB should "either approve the new Air Express agreement or order a hearing in which an evidentiary record is made concerning the new circumstances involving REA and Air Express."[4]

At that stage of its existence REA had long passed the point of ideology regarding Air Express, and was simply and humbly seeking the opportunity to survive. The CAB turned a deaf ear,

4. *Petition for Reconsideration*, April 29, 1975, pp. 13-14. The Board denied this request in its order dated May 23, 1975. REA did not file a separate petition to review as the Second Circuit had retained jurisdiction over the matter.

denied a hearing on what the possibilities might be, and the court below converted CAB's non-consideration of the subject into what is merely a speculation, unsupported by record evidence, namely that ". . . the Board, apparently recognizing employee welfare as a factor to be considered in deciding what course would be in the public interest . . . granted air freight forwarder authority to REA specifically on the ground that its operation as a freight forwarder would provide the best opportunity to benefit its employees." (21a-22a).

We respectfully disagree with that conclusion even based upon the record as it was presented in a hearing which ended in 1971.[5] But as applied to a situation which existed in 1975, following substantial and profound changes of circumstances, not made the subject of a hearing before the Board, we submit that the application of a false premise, namely that air freight forwarding will be of benefit, when in fact the effect of such a decision would be to wipe out the company, its jobs, and the public services it performs, represents a denial of due process in a very basic way. REA, its management, its employees, its creditors, and its customers, all of whom had the greatest and most direct interest in the survival of the company and its services, and with no motive whatsoever for seeing the wrong choice made, all believed that the forced conversion of the company into air freight forwarding would be not "REA's best opportunity," but a disaster.

As shown in an affidavit submitted by REA, such a conversion would involve substantial changes in operations, in

5. The decision below errs in indicating that dual authority to provide both Air Express and air freight forwarding service was a primary objective of REA. Dual authority was requested *only as an alternative position if other improvements in Air Express — primarily reduction of costs and rates — were not made.*

facilities, in marketing approach, in customers, in employee practices and training requirements, which REA was unable to make. Thus, in the changed circumstances, the decision to terminate Air Express became a corporate death sentence.

". . . some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff v. McDonnell*, 418 U.S. 539, 557-8 (1974). We submit that such a "hearing" must take place with respect to the factual situation as it exists in some proximate time relationship to the period in which the deprival of property interests occurs. In the approximately four years following the hearing in the Air Express Service Investigation, there have been significant developments involving REA, other carriers, and in the industry itself. There is a fundamental question of how "stale" a record may be and still justify "substantial evidence" reliance thereon within the context of the constitutional guarantee of due process.

Even the termination of welfare benefits without a hearing has been held to infringe upon due process, see *Goldberg v. Kelly*, 397 U.S. 254 (1970), and the termination of a pioneering public service should be given no less consideration. In a constitutional scale of values, "there is a human difference between losing what one has and not getting what one wants," a distinction which "is valid in economic regulation," also, because "capital has been expended, investor expectations have been aroused, and people have been employed." See Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975), and discussion therein.

Finally, "The required degree of procedural safeguards varies directly with the importance of the private interest

affected . . ." (article cited *supra,* at 1278), and the importance and magnitude of the public and private interests affected in this litigation are substantially greater than those in many of the cases in which this Court has taken for review to consider the applicability of the due process requirements. (*Ibid.*)

CONCLUSION

So that the decision below will not constitute a further obstacle to hopes and efforts for the rehabilitation and restoration of express services for the shipping public, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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